

## Boston College Environmental Affairs Law Review

---

Volume 41

Issue 3 *Electronic Supplement*

Article 5

---


3-13-2014

# The Ninth Circuit Constrains Non-Enforceable Public-Private Endangered Species Conservation Agreements

Benjamin Hanna

*Boston College Law School*, [benjamin.hanna@bc.edu](mailto:benjamin.hanna@bc.edu)

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/ealr>

 Part of the [Animal Law Commons](#), [Energy and Utilities Law Commons](#), and the [Environmental Law Commons](#)

---

### Recommended Citation

Benjamin Hanna, *The Ninth Circuit Constrains Non-Enforceable Public-Private Endangered Species Conservation Agreements*, 41 B.C. Env'tl. Aff. L. Rev. E. Supp. 42 (2014), <http://lawdigitalcommons.bc.edu/ealr/vol41/iss3/5>

This Comments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# THE NINTH CIRCUIT CONSTRAINS NON-ENFORCEABLE PUBLIC-PRIVATE ENDANGERED SPECIES CONSERVATION AGREEMENTS

BENJAMIN HANNA \*

**Abstract:** In 2009, Ruby Pipeline, L.L.C. proposed to build a 678-mile pipeline from Wyoming to Oregon that would cross through the critical habitat of endangered species. The Federal Energy Regulatory Commission and the Fish and Wildlife Service worked with Ruby to design a Conservation Action Plan consisting of voluntary measures aimed at mitigating the effects of the pipeline on nine endangered fish species. Relying on the plan, federal agencies approved the pipeline project. Environmental groups challenged the agencies' decision to rely on a voluntary conservation plan. In *Center for Biological Diversity v. U.S. Bureau of Land Management*, the U.S. Court of Appeals for the Ninth Circuit held that the agencies violated the Endangered Species Act because the Act requires enforceable rather than voluntary conservation plans. This Comment argues that the Ninth Circuit's decision correctly clarifies the role that public-private conservation plans may play within the ESA in a way that will ensure the protection of endangered species.

## INTRODUCTION

In the past thirty years, the consumption of natural gas in the United States has increased steadily.<sup>1</sup> To keep up with demand, the gross amount of natural gas withdrawn from United States soil has surged nearly twenty-five percent since 2005—from just more than 65 billion cubic feet per day (“Bcf/d”) to more than 81 Bcf/d.<sup>2</sup> Experts predict that the use of natural gas will continue to increase through 2040.<sup>3</sup> As consumption has increased, so has

---

\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2013–2014.

<sup>1</sup> *U.S. Natural Gas Total Consumption*, U.S. ENERGY INFO. ADMIN. (Oct. 31, 2013), <http://www.eia.gov/dnav/ng/hist/n9140us2a.htm>, available at <http://perma.cc/39LA-MCN5>.

<sup>2</sup> U.S. ENERGY INFO. ADMIN., BEST ESTIMATE OF GROSS WITHDRAWALS BY AREA BY MONTH, BCF/D (2013), available at [http://www.eia.gov/oil\\_gas/natural\\_gas/data\\_publications/eia914/eia914.html](http://www.eia.gov/oil_gas/natural_gas/data_publications/eia914/eia914.html) and <http://perma.cc/SJT9-LATA> (follow “Figure Data” hyperlink under State Natural Gas Gross Withdrawals chart to access spreadsheet).

<sup>3</sup> *Market Trends—Natural Gas*, U.S. ENERGY INFO. ADMIN. (May 2, 2013), [http://www.eia.gov/forecasts/aeo/MT\\_naturalgas.cfm](http://www.eia.gov/forecasts/aeo/MT_naturalgas.cfm), available at <http://perma.cc/9GWK-ET3V>.

investment in pipelines to transport natural gas throughout the country.<sup>4</sup> Hundreds of thousands of miles of natural gas pipelines exist already, and thousands more are in the construction or approval phases.<sup>5</sup>

The Federal Energy Regulatory Commission (FERC) is charged with reviewing and approving proposed natural gas pipeline projects.<sup>6</sup> When approving a project, FERC must square the proposed pipeline with the requirements of the Endangered Species Act (ESA).<sup>7</sup> This includes an affirmative duty to assess the impact of the proposed project and to prevent the harming of federally endangered or threatened species, or prevent adverse modifications to the critical habitat of such species.<sup>8</sup> When projects are proposed by private entities, these entities are also involved in the impact assessment required by the ESA.<sup>9</sup>

In proposing a project to the Fish and Wildlife Service (FWS), which enforces the ESA, a proposing agency and private entity may include conservation measures aimed at protecting the affected endangered species.<sup>10</sup> These measures, sometimes called Conservation Action Plans (CAPs), constitute an agreement between the FWS, the federal action agency, and the private applicant, and become an official component of the project.<sup>11</sup>

<sup>4</sup> See *Over Half of U.S. Natural Gas Pipeline Projects in 2012 Were in the Northeast*, U.S. ENERGY INFO. ADMIN. (March 25, 2013), <http://www.eia.gov/todayinenergy/detail.cfm?id=10511#investment>, available at <http://perma.cc/BY3Q-DBWZ> (showing a major boom in pipeline investment between 2006 and 2012).

<sup>5</sup> *About U.S. Natural Gas Pipelines*, U.S. ENERGY INFO. ADMIN., [http://www.eia.gov/pub/oil\\_gas/natural\\_gas/analysis\\_publications/ngpipeline/index.html](http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/index.html) (last visited Nov. 13, 2013), available at <http://perma.cc/XT5D-X8VX> (showing that as of 2008, 305,000 miles of natural gas pipelines were already in existence); see *Approved Major Pipeline Projects (2009 to Present)*, FED. ENERGY REG. COMM'N (Feb. 13, 2013), <http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp>, available at <http://perma.cc/S528-TUYM>.

<sup>6</sup> Natural Gas Act, 15 U.S.C. §§ 717a(9), 717f(c)(1)(A) (2012) (requiring FERC to approve all proposed natural gas transmission facility projects).

<sup>7</sup> See Endangered Species Act, 16 U.S.C. § 1536(a)(3) (2012) (requiring federal agencies to consult with the Department of the Interior before undertaking projects that might harm endangered species).

<sup>8</sup> *Id.* § 1536(a)(2).

<sup>9</sup> See *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 949 (9th Cir. 2003) (noting the private company's role in negotiating an agreement for mitigation of a project's effects on endangered species).

<sup>10</sup> 50 C.F.R. § 402.01(b) (2013); U.S. FISH & WILDLIFE SERV., ENDANGERED SPECIES ACT CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING SECTION 7 CONSULTATIONS AND CONFERENCES 4-19 (1998), available at [http://www.nmfs.noaa.gov/pr/pdfs/laws/esa\\_section7\\_handbook.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/esa_section7_handbook.pdf) and <http://perma.cc/7G2Z-FJV4>.

<sup>11</sup> See Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1109 (9th Cir. 2012); U.S. FISH & WILDLIFE SERV., *supra* note 10, at xii. Public-private conservation agreements are referred to by a variety of names, such as "conservation agreements," "conservation measures," or "mitigation measures." See *Selkirk*, 336 F.3d at 955 (using the term "Conservation Agreement"); *Sierra Club v. Marsh*, 816 F.2d 1376, 1379 (9th Cir. 1987) (using the term "mitigation measures"); U.S. FISH & WILDLIFE SERV., *supra* note 10, at xii (using the term "conservation measures"). To

The role of a CAP was the primary issue in *Center for Biological Diversity v. U.S. Bureau of Land Management*.<sup>12</sup> The U.S. Court of Appeals for the Ninth Circuit found that during consultation, the FWS improperly used the CAP negotiated by FERC, and the private applicant Ruby Pipeline, L.L.C., (“Ruby”), to circumvent the requirements of the ESA.<sup>13</sup> This Comment argues that the Ninth Circuit’s decision correctly reaffirms the role that CAPs may play under the ESA and provides important guidance for future agreements between private parties and federal agencies.<sup>14</sup> Although public-private mitigation efforts during ESA consultation should be encouraged, the Ninth Circuit’s decision clarifies that these accords may not serve as shortcuts to the goal of protecting endangered species.<sup>15</sup>

### I. FACTS AND PROCEDURAL HISTORY

Ruby submitted an application to FERC in early 2009 to build a 678-mile natural gas pipeline from Wyoming to Oregon.<sup>16</sup> The route for the 42-inch-diameter pipeline encompassed approximately 2,291 acres of federal lands, so Ruby also filed with the Bureau of Land Management (BLM) to obtain right-of-ways over these lands.<sup>17</sup> During FERC’s review of Ruby’s application, the agency requested a formal consultation with the FWS to determine the proposed pipeline’s potential impact on endangered or threatened species and their habitats.<sup>18</sup>

The pipeline would cross 209 bodies of water that fall within or are connected to critical habitats of nine listed endangered species of fish, and the FWS determined that the project would adversely affect these species.<sup>19</sup> The FWS’s biological opinion identified five species—Lahontan cutthroat trout, Warner sucker, Lost River sucker, shortnose sucker, and Modoc sucker—that would be adversely affected by the project’s water crossings.<sup>20</sup> The four other species—Colorado pikeminnow, humpback chub, razorback sucker, and bonytail chub—would be adversely affected by the proposed depletion of surface and groundwater during the construction phase.<sup>21</sup>

---

avoid confusion, this Comment uses the term “Conservation Action Plan,” used by the parties in *Center for Biological Diversity*. See 698 F.3d at 1109.

<sup>12</sup> 698 F.3d at 1109.

<sup>13</sup> See *id.* at 1108–09, 1119.

<sup>14</sup> See *infra* notes 88–109 and accompanying text.

<sup>15</sup> See *infra* notes 88–109 and accompanying text.

<sup>16</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1106, 1108.

<sup>17</sup> *Id.* at 1105–06.

<sup>18</sup> *Id.* at 1108.

<sup>19</sup> *Id.* at 1106.

<sup>20</sup> U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION 79 (2010), available at <http://goo.gl/nXhZ2c> and <http://perma.cc/AC5R-5W87>.

<sup>21</sup> *Id.* at 55, 76.

As a result of these findings, the FWS sent a number of suggested measures to Ruby that would address the project's impact on listed species and their habitats.<sup>22</sup> The FWS requested that Ruby review the suggestions and file a final CAP that would become an official part of the project.<sup>23</sup> FERC objected to including the CAP in the final proposed action.<sup>24</sup> FWS then revised the agreement with Ruby to include language that specified that the CAP was not a part of the proposed action for ESA purposes.<sup>25</sup> Ruby's pledge to implement certain conservation measures was formalized in a "Letter of Commitment," with a list of measures specifically tailored to address the project impacts identified by the FWS's initial Biological Opinion.<sup>26</sup> Ruby committed to funding seven of the twelve measures, and predicted that each of the actions would be initiated within five years of receiving approval from FERC.<sup>27</sup> The letter did not identify any penalties or consequences to be imposed upon Ruby should it fail to carry out the measures.<sup>28</sup>

Despite internal protests, the FWS determined that Ruby's voluntary measures were "reasonably certain to occur" and thus factored the measures into its final Biological Opinion.<sup>29</sup> Including Ruby's CAP measures as cumulative effects, the FWS concluded that the project would not jeopardize the continued existence of the listed species nor adversely modify critical habitat.<sup>30</sup> In turn, the BLM relied on the FWS's finding of no jeopardy in issuing its Record of Decision.<sup>31</sup> On July 30, 2010, FERC issued Ruby an initial notice to proceed, and the construction of the pipeline commenced the next day.<sup>32</sup>

On the same day construction began, the non-profit group Center for Biological Diversity (CBD) petitioned the Ninth Circuit pursuant to the Natural Gas Act to review the BLM's issuance of the rights-of-way and the FWS's

---

<sup>22</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1110.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; Letter of Commitment by Ruby Pipeline Regarding the Endangered Species Act Conservation Action Plan for the Ruby Pipeline Project 2 (March 18, 2010) [hereinafter Letter of Commitment], available at [http://www.blm.gov/pgdata/etc/medialib/blm/nv/nepa/ruby\\_pipeline\\_project/rod/attachment\\_g.Par.59264.File.dat/ESA\\_Letter\\_of\\_Commitment\\_Final\\_3-18-10.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/nepa/ruby_pipeline_project/rod/attachment_g.Par.59264.File.dat/ESA_Letter_of_Commitment_Final_3-18-10.pdf) and <http://perma.cc/5UTS-6ASQ>.

<sup>25</sup> Letter of Commitment, *supra* note 24, at 2.

<sup>26</sup> *Id.* (attachment 1). A Biological Opinion evaluates a proposed project for its effect on endangered species. *Infra* notes 45–48 and accompanying text.

<sup>27</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1111.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1112, 1117–18; U.S. FISH & WILDLIFE SERV., *supra* note 20, at 101.

<sup>30</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1112.

<sup>31</sup> *Id.* at 1106. A finding of "no jeopardy" means that after a comprehensive assessment, the FWS found that the project will not jeopardize the continued existence of the affected species. *See infra* notes 48–54 and accompanying text.

<sup>32</sup> *Ruby Natural Gas Pipeline Begins Service Today (July 28, 2011)*, U.S. ENERGY INFO. ADMIN. (July 28, 2011), <http://www.eia.gov/todayinenergy/detail.cfm?id=2410#>, available at <http://perma.cc/3TVE-ZQDW>.

Biological Opinion.<sup>33</sup> The CBD argued that the Biological Opinion incorrectly relied upon Ruby's CAP.<sup>34</sup> Less than three weeks later, on August 18, 2010, CBD filed an emergency motion to stop the construction of the pipeline pending appeal.<sup>35</sup> The Ninth Circuit granted review of the federal respondents' activities but denied the emergency motion seeking injunctive relief.<sup>36</sup> In the meantime, Ruby intervened to join the federal agencies as a respondent.<sup>37</sup>

Many other parties joined CBD and petitioned the Ninth Circuit to review the pipeline project, and the court eventually consolidated the parties to resolve the common issues regarding the ESA.<sup>38</sup> The court held that the FWS had improperly included Ruby's CAP in its jeopardy analysis because the CAP was unenforceable.<sup>39</sup> This action violated the ESA, according to the Court, because when the CAP measures are unenforceable, neither the FWS nor the private party is accountable for the conservation of the endangered species.<sup>40</sup> The Biological Opinion was thus invalidated and remanded to the FWS to either make the CAP measures enforceable or to exclude the CAP's benefits from the jeopardy analysis.<sup>41</sup>

## II. LEGAL BACKGROUND

The Endangered Species Act (ESA) imposes upon all federal agencies a duty to conserve endangered and threatened species and to utilize agency powers in furtherance of the ESA.<sup>42</sup> Two provisions in the ESA work together to place this duty on agencies: § 9, which prohibits any person from taking a member of a protected species, and § 7, which requires federal agencies to prevent violations of § 9.<sup>43</sup> Section 7 specifically requires that any action au-

---

<sup>33</sup> 15 U.S.C. § 717r(d)(1) (2012); Joint Opening Brief of Petitioners Center for Biological Diversity and Defenders of Wildlife et al. at 2, *Ctr. for Biological Diversity*, 698 F.3d 1101 (Nos. 10-72552, 10-72356, 10-72762, 10-72768, 10-72775) [hereinafter CBD Opening Brief].

<sup>34</sup> CBD Opening Brief, *supra* note 33, at 7.

<sup>35</sup> Petitioner's Emergency Motion for Injunction Pending Appeal Under Circuit Rule 27-3 at ii, *Ctr. for Biological Diversity*, 698 F.3d 1101 (No. 10-72356).

<sup>36</sup> Order at 1, *Ctr. for Biological Diversity*, 698 F.3d 1101 (No. 10-72356).

<sup>37</sup> Ruby Pipeline, L.L.C.'s Motion to Intervene as Respondent at 1, *Ctr. for Biological Diversity*, 698 F.3d 1101 (No. 10-72356).

<sup>38</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1106; Order at 1, *Ctr. for Biological Diversity*, 698 F.3d 1101 (Nos. 10-72552, 10-72356, 10-72762, 10-72768, 10-72775).

<sup>39</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1119.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1128. Because the court denied the Center's emergency motion to halt the project, construction continued and the pipeline was completed, and therefore conservation measures were directed at mitigating the adverse effects on the fish species during operation rather than construction. *See id.* at 1106 n.2.

<sup>42</sup> 16 U.S.C. § 1531(c)(1) (2012).

<sup>43</sup> *Id.* §§ 1536(a)(2), 1538(a)(1)(B); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 (9th Cir. 2012) (describing the interlocking relationship between § 7 and § 9).

thorized by a federal agency be unlikely to jeopardize endangered or threatened species, or adversely modify critical habitat.<sup>44</sup>

To ensure compliance with § 7, agencies must determine whether any endangered species might live in the area where the proposed action would occur.<sup>45</sup> When endangered species might be present, the agency must prepare a biological assessment.<sup>46</sup> If the biological assessment reveals potential adverse effects on protected species, the agency reviewing the action (the “action agency”) must formally consult with the Fish and Wildlife Service (FWS).<sup>47</sup> The FWS then completes a Biological Opinion, which evaluates whether the proposed project will jeopardize the continued existence of the protected species or adversely modify the species’ critical habitat.<sup>48</sup>

When making a jeopardy determination, the FWS must evaluate both the “effects of the action” and its “cumulative effects” on the listed species or critical habitat.<sup>49</sup> The “effects of the action” are those direct and indirect effects of a proposed project; included in this are interrelated actions that are connected to the primary project.<sup>50</sup> To determine whether an action is interrelated to the primary project, the U.S. Court of Appeals for the Ninth Circuit uses a but-for causation test: but for the primary project, the action at issue would not take place.<sup>51</sup> “Cumulative effects” are the effects of unrelated private or state activities in the proposed project area that are reasonably certain to occur in the future.<sup>52</sup> Cumulative effects must be considered in a jeopardy determination.<sup>53</sup> These effects are only background considerations, because they are the result of activities outside the action agency’s control, and thus the action agency has no power or obligation to see that these activities materialize.<sup>54</sup>

---

<sup>44</sup> 16 U.S.C. § 1536(a)(2).

<sup>45</sup> *Id.* § 1536(c)(1).

<sup>46</sup> *Id.* The purpose of a biological assessment is to consider the potential effects of an action on endangered species. 50 C.F.R. § 402.12(a) (2013).

<sup>47</sup> 50 C.F.R. § 402.14(a); *id.* § 402.02 (defining “Formal Consultation” as a process between a federal agency and the FWS).

<sup>48</sup> *Id.* § 402.14(g)(4).

<sup>49</sup> *Id.* § 402.14(g)(3). Courts use the term “jeopardy determination” to describe the FWS’s analysis of whether a project will jeopardize the continued existence of a protected species or adversely modify the species’ critical habitat. This is a component of the Biological Opinion. *Ctr. for Biological Diversity*, 698 F.3d at 1109; *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 948 (9th Cir. 2003); 50 C.F.R. § 402.14(h)(3).

<sup>50</sup> 50 C.F.R. § 402.02. If the effects of the action change during the project, or if previously unconsidered effects come to light, the action agency must reinitiate consultation with the FWS. *Id.* § 402.16(b)–(c). New or modified cumulative effects do not require reinitiation of consultation. *See id.* (notably lacking mention of cumulative effects for purposes of reinitiating consultation).

<sup>51</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1113; *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

<sup>52</sup> *See* 50 C.F.R. § 402.02 (2013).

<sup>53</sup> *Id.* § 402.14(g)(3).

<sup>54</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1113–14.

In *Sierra Club v. Marsh*, the Ninth Circuit in 1987 reviewed an agreement between a project applicant and a federal agency to implement conservation measures.<sup>55</sup> The Conservation Action Plan (CAP) in *Marsh* established a trade in which the Army Corps of Engineers (Corps) permitted forty-four acres of marshland habitat to be destroyed to build a flood control channel.<sup>56</sup> In exchange for this habitat destruction, the County of San Diego (“County”), the project applicant, was required to acquire 188 acres of marshland to create a publicly owned wildlife refuge.<sup>57</sup> The Corps evaluated the project relying on the creation of the wildlife refuge in its analysis.<sup>58</sup> When the County failed to acquire the mitigation wetlands, the Corps did not reevaluate the project’s impact on endangered species.<sup>59</sup> The Ninth Circuit held that this failure to reevaluate was a violation of § 7 because the Corps relied on a project plan that included the creation of a wildlife refuge, without ensuring that the County would actually create the refuge.<sup>60</sup> By allowing the project to continue after the County failed to acquire the mitigation land, the Corps was not ensuring the protection of the endangered species.<sup>61</sup>

In *Selkirk Conservation Alliance v. Forsgren*, an environmental group sued the United States Forest Service (USFS) and the FWS in 2001 for relying on an agreement with a private timber company seeking to build logging roads through grizzly bear habitat.<sup>62</sup> The FWS initially found that building more roads through the habitat would adversely affect grizzly bears.<sup>63</sup> As a result of that finding, the parties created a CAP with mandatory measures designed to minimize and offset the effects of the logging roads on grizzlies.<sup>64</sup> The CAP was then incorporated into the terms of the FWS’s Biological Opinion.<sup>65</sup> Selkirk Conservation Alliance challenged the Biological Opinion and claimed that the agencies were wrong to incorporate the CAP in the Opinion.<sup>66</sup> The Ninth Circuit disagreed and found that the agencies acted properly by incorporating the CAP into the Biological Opinion because the CAP contained mandatory and enforceable measures.<sup>67</sup> The Ninth Circuit qualified its finding, however, by stating that “federal agencies cannot delegate the protection of the environ-

---

<sup>55</sup> 816 F.2d at 1384–89.

<sup>56</sup> *Id.* at 1385.

<sup>57</sup> *Id.* at 1380, 1385.

<sup>58</sup> *Id.* at 1379–80, 1385.

<sup>59</sup> *Id.* at 1381.

<sup>60</sup> *Id.* at 1386.

<sup>61</sup> *Id.*

<sup>62</sup> 336 F.3d 944, 949, 954 (9th Cir. 2003).

<sup>63</sup> *Id.* at 954–55.

<sup>64</sup> *Id.* at 955, 956 n.5.

<sup>65</sup> *Id.* at 953 n.4 (explaining that the CAP was incorporated into the terms and conditions of the Biological Opinion).

<sup>66</sup> *Id.* at 954.

<sup>67</sup> *Id.* at 956 & n.5 (noting that all parties implicitly assume the CAP is legally enforceable).



ment to public-private accords . . . [and] the agencies must vigorously and independently enforce environmental laws.”<sup>68</sup>

In *National Wildlife Federation v. National Marine Fisheries Service*, the Ninth Circuit in 2008 reviewed a Biological Opinion that concluded that a series of hydroelectric dams would not jeopardize several species of salmon.<sup>69</sup> The National Marine Fisheries Service (NMFS) concluded that the salmon would not be jeopardized in part because it relied on the future installation of a fish passage device.<sup>70</sup> The proposed action, however, included no binding assurance that these devices would actually be installed.<sup>71</sup> The Ninth Circuit upheld the district court’s finding that a Biological Opinion may not rely on non-binding future improvements.<sup>72</sup>

The U.S. Court of Appeals for the Eleventh Circuit has similarly held that a federal agency’s duty to conserve endangered species may not be satisfied by voluntary measures.<sup>73</sup> In *Florida Key Deer v. Paulison*, the Eleventh Circuit in 2008 found that the Federal Emergency Management Agency (FEMA) violated § 7 when it implemented only a voluntary program incentivizing communities to adopt habitat conservation plans.<sup>74</sup> In rejecting FEMA’s program, the Eleventh Circuit held that voluntary measures do not satisfy § 7 because they are not likely to conserve endangered species.<sup>75</sup>

### III. ANALYSIS

In *Center for Biological Diversity v. U.S. Bureau of Land Management*, the U.S. Court of Appeals for the Ninth Circuit held that a Conservation Action Plan (CAP) agreed upon by a federal agency and project applicant must be enforceable within the Endangered Species Act (ESA) to factor into the Fish and Wildlife Service’s (FWS) jeopardy determination.<sup>76</sup> The court set aside the FWS’s Biological Opinion because it improperly relied on a CAP created by the Federal Energy Regulatory Commission (FERC) and Ruby Pipeline, L.L.C. (“Ruby”).<sup>77</sup>

---

<sup>68</sup> *Id.* at 955.

<sup>69</sup> 524 F.3d 917, 922–23 (9th Cir. 2008).

<sup>70</sup> *Id.* at 935.

<sup>71</sup> *Id.* at 935–36.

<sup>72</sup> *Id.*

<sup>73</sup> See *Florida Key Deer v. Paulison*, 522 F.3d 1133, 1145, 1147 (11th Cir. 2008).

<sup>74</sup> See *id.* (noting that agencies do not satisfy their obligations if they carry out an insignificant measure that does not actually conserve endangered species).

<sup>75</sup> See *id.* The Eleventh Circuit recognized that although agencies might have discretion in how to carry out their ESA obligations, total inaction is not an option. *Id.* at 1146. The court noted that FEMA failed to show a single community that had signed up for its plan, which demonstrated that voluntary conservation programs can amount to total inaction. *Id.* at 1147.

<sup>76</sup> 698 F.3d 1101, 1117 (9th Cir. 2012).

<sup>77</sup> *Id.* at 1110, 1119.

The FWS's classification of the CAP measures as "cumulative effects" in the Biological Opinion was crucial to the court's holding.<sup>78</sup> The court pointed out that cumulative effects "are essentially background considerations, relevant to the jeopardy determination but not constituting federal actions and so beyond the action agency's power to effectuate."<sup>79</sup> Classifying the CAP measures as cumulative effects removes measures in the CAP from the requirements of § 7, and trusts the implementation of the CAP to the discretion of the private applicant.<sup>80</sup>

The court rejected the respondents' claims that the CAP measures were reliable because the measures could be enforced by FERC and the Bureau of Land Management (BLM).<sup>81</sup> The court found this arrangement misguided because it permitted the action agencies to weigh their own priorities against the protection of the endangered species—a balancing act that is not a part of the ESA.<sup>82</sup> In rejecting the respondents' argument, the court noted that Congress entrusted the federal government's protection of endangered and threatened species solely to the provisions of the ESA.<sup>83</sup>

The court further held that the CAP measures were "unequivocally inter-related" with the proposed pipeline project.<sup>84</sup> Ruby described the CAP measures as independent of the FERC proposed project, and outside the purview of § 7 of the ESA.<sup>85</sup> The Ninth Circuit, however, noted that a quid-pro-quo relationship clearly existed between Ruby and FERC such that Ruby would not implement the CAP measures without the approval of the project.<sup>86</sup> As the measures were dependent on the project, they were not cumulative effects and instead should have been categorized as effects of the proposed action.<sup>87</sup>

---

<sup>78</sup> See *id.* at 1117, 1128.

<sup>79</sup> *Id.* at 1113–14.

<sup>80</sup> See *id.* at 1119.

<sup>81</sup> See *id.* at 1115–16. The BLM could enforce the terms of the CAP under the Mineral Leasing Act regulations by suspending or terminating rights-of-way should Ruby violate the terms of the agreement. See *id.* at 1116 (citing 43 C.F.R. § 2886.17). The court was not convinced that the BLM would terminate the right-of-way for a completed pipeline project already in operation. *Id.* FERC is required by the Natural Gas Act to impose penalties for violations of the terms and conditions of the CAP, but FERC has the discretion to determine the magnitude of the penalties. *Id.* (citing 15 U.S.C. § 717t–1 (2006)).

<sup>82</sup> See *id.* The court reiterated that "Congress considered and rejected language that would have permitted an agency to weigh the preservation of the species against the agency's primary mission." *Id.* at 1115–16 (quoting *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987)).

<sup>83</sup> *Id.* at 1117.

<sup>84</sup> *Id.* at 1118.

<sup>85</sup> Letter of Commitment, *supra* note 24, at 2.

<sup>86</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1118.

<sup>87</sup> See *id.* at 1118–19 (finding that reliance on the CAP would have been proper only if the CAP measures were included in the Biological Opinion as part of the project rather than as cumulative effects).

The Ninth Circuit's insistence that CAP measures be enforceable to be relied upon by federal agencies is consistent with the court's precedent.<sup>88</sup> The decision in *Center for Biological Diversity* affirms the Ninth Circuit's requirement that "[e]ven given the cooperation of private entities, [federal] agencies must vigilantly and independently enforce environmental laws."<sup>89</sup> Furthermore, the court's holding in *Center for Biological Diversity* is consistent with the ESA's requirement that federal agencies utilize their power in furtherance of the statute's objectives.<sup>90</sup> The decision thus strengthens the protection of endangered species by ensuring that when such species are affected by a project, federal agencies adhere to the provisions of the ESA rather than other mechanisms.<sup>91</sup>

The Ninth Circuit in *Center for Biological Diversity* clarified how the FWS should rely on mitigation promises when determining whether a project will jeopardize an enlisted species.<sup>92</sup> The court's decision resolved the use of CAPs in a way that the Ninth Circuit had previously left to inference or relegated to footnotes.<sup>93</sup> The ESA's statutory scheme, and the regulations interpreting that scheme, impose procedural and substantive duties upon federal agencies to protect endangered species.<sup>94</sup> Simultaneously, private actors and federal agencies are expected to work together to allow projects to move forward while preserving and aiding in the recovery of listed species.<sup>95</sup> The Ninth Circuit's holding in *Center for Biological Diversity* helps define how these public-private mitigation plans may be used in accordance with the ESA.<sup>96</sup>

The decision in *Center for Biological Diversity* clarifies an issue not directly explained by the court in *Sierra Club v. Marsh*.<sup>97</sup> In *Marsh*, the Army

---

<sup>88</sup> See *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 956 n.5 (explaining that federal agencies may rely on CAPs when the CAP imposes enforceable obligations on the parties); *Marsh*, 816 F.2d at 1388 (finding that the Army Corps of Engineers violated the ESA when it did not carry out the CAP).

<sup>89</sup> 698 F.3d at 1117 (quoting *Selkirk*, 336 F.3d at 955).

<sup>90</sup> *Id.*; see 16 U.S.C. § 1531(c)(1) (2012).

<sup>91</sup> See *Ctr. for Biological Diversity*, 698 F.3d at 1116–17 (rejecting respondents' argument that the CAP measures were sufficient because they were enforceable under statutes other than the ESA); *infra* notes 112–115 and accompanying text.

<sup>92</sup> See *Ctr. for Biological Diversity*, 698 F.3d at 1116, 1117 (clarifying precedent and finding that a CAP must be enforceable under the ESA for it to factor into the jeopardy determination).

<sup>93</sup> See *id.* at 1117; *Selkirk*, 336 F.3d at 953 n.4, 956 n.5 (explaining that the CAP at issue was mandatory and enforceable); *Marsh*, 816 F.2d at 1379, 1388 (finding that the ESA had been violated because the wetlands preservation had not occurred, and notably lacking discussion about the enforceability of the CAP).

<sup>94</sup> 16 U.S.C. §§ 1531(c)(1), 1536(a)(2).

<sup>95</sup> See *Selkirk*, 336 F.3d at 955 (recognizing that the concept of cooperative CAPs is appealing and should be encouraged); 50 C.F.R. §§ 402.02–.14 (2012) (involving the applicant throughout the consultation and requiring that the applicant have time to contribute information during the process).

<sup>96</sup> See 698 F.3d at 1128 (finding that CAP measures must be characterized as interrelated effects or excluded from a jeopardy analysis altogether).

<sup>97</sup> See *infra* notes 98–102 and accompanying text.

Corps of Engineers (“Corps”) made a wetlands exchange part of the project plan.<sup>98</sup> The court in *Marsh* found that the Corps was required to reinitiate consultation with the FWS when the wetlands exchange failed.<sup>99</sup> The court’s finding implies that the wetlands mitigation exchange was considered an effect of the action because only modifications to effects of the action required new consultation.<sup>100</sup> In *Center for Biological Diversity*, the Ninth Circuit addressed why categorizing mitigation measures as effects of the action is crucial to the ESA.<sup>101</sup> By relegating Ruby’s CAP measures to cumulative effects in the Biological Opinion, the FWS was ensuring that the measures were beyond the agencies’ power to enforce.<sup>102</sup>

The court in *Center for Biological Diversity* also clarified confusion on the enforceability of mitigation measures in *Selkirk Conservation Alliance v. Forsgren*.<sup>103</sup> The court in *Selkirk* held that the Biological Opinion properly relied upon the CAP to which the United States Forest Service (USFS), the FWS, and the private timber company had agreed.<sup>104</sup> The court’s explanation as to how the Biological Opinion had properly incorporated the CAP was limited and stated that the CAP was mandatory because the mitigation measures were enforceable under the ESA.<sup>105</sup> In *Center for Biological Diversity*, Ruby pointed to *Selkirk* as an example of the court allowing the FWS to rely on promised mitigation measures as “cumulative effects” when performing a jeopardy determination.<sup>106</sup> The court dismissed Ruby’s argument by highlighting that the CAP at issue in *Selkirk* was in fact enforceable under the ESA.<sup>107</sup>

Moreover, the *Center for Biological Diversity* decision provides guidance on the matter of voluntary CAPs at issue in the Ninth Circuit case *National Wildlife Federation v. National Marine Fisheries Service*, and in the Eleventh Circuit case *Florida Key Deer v. Paulison*.<sup>108</sup> In *Florida Key Deer*, the Eleventh Circuit expressed concern that relying on voluntary measures to preserve endangered species leaves open the possibility of total inaction.<sup>109</sup> In *National*

---

<sup>98</sup> 816 F.2d at 1379.

<sup>99</sup> *Id.* at 1388.

<sup>100</sup> See *id.* at 1387 (noting that a change to the *effects of the action* requires reinitiation); *id.* at 1388 (finding that the Corps violated the reinitiation regulation by failing to reinitiate consultation when the wetlands exchange did not occur).

<sup>101</sup> See 698 F.3d at 1113, 1116 (noting that categorizing mitigation measures as cumulative effects rather than effects of the action circumvents the protections of the ESA).

<sup>102</sup> *Id.* at 1116.

<sup>103</sup> *Id.* at 1116–17 (disagreeing with Ruby’s interpretation of *Selkirk*).

<sup>104</sup> See *Selkirk*, 336 F.3d at 949, 956.

<sup>105</sup> See *id.* at 953 n.4. The court further noted that the parties implicitly assumed the CAP was enforceable. *Id.* at 956 n.5.

<sup>106</sup> *Ctr. for Biological Diversity*, 698 F.3d at 1116.

<sup>107</sup> See *id.* at 1117.

<sup>108</sup> *Supra* notes 105–107 and accompanying text.

<sup>109</sup> See 522 F.3d 1133, 1145, 1147 (11th Cir. 2008) (finding that relying on a voluntary program that is not reasonably likely to conserve endangered species permits total inaction).

*Wildlife Federation*, the Ninth Circuit held that federal agencies cannot rely on future, non-binding CAP measures.<sup>110</sup> The court in *Center for Biological Diversity* made clear that within the ESA scheme, cumulative effects amount to voluntary, non-binding measures and therefore cannot be relied upon to protect endangered species.<sup>111</sup>

The Ninth Circuit's decision lays out a clear rule that will strengthen the protection of endangered species by ensuring that federal agencies are accountable for the implementation of CAP measures.<sup>112</sup> This holding ensures that, within the Ninth Circuit, the protection of endangered species will not be left to the discretion of the private applicant and federal agencies other than the FWS.<sup>113</sup> Congress did not intend to allow private parties and federal agencies to weigh their own priorities against the protection of endangered species.<sup>114</sup> The court's decision implements Congress's intent by placing the protection of endangered species within the purview of the ESA and the FWS, the statute and agency devoted to such protection.<sup>115</sup>

## CONCLUSION

The Endangered Species Act (ESA), through a series of procedural and substantive requirements, imposes upon federal agencies a duty to conserve endangered and threatened species and their habitat. The U.S. Court of Appeals for the Ninth Circuit's decision in *Center for Biological Diversity v. U.S. Bureau of Land Management* ensures that when a project involving federal agencies is conditioned upon the implementation of Conservation Action Plans (CAPs), the CAP must be a formal component of the project itself and may not be considered just a cumulative effect of the project. This keeps the CAP within the purview of the ESA and thus enforceable should the private party or federal action agency fail to implement the conservation measures.

**Preferred Citation:** Benjamin Hanna, Comment, *The Ninth Circuit Constrains Non-Enforceable Public-Private Endangered Species Conservation Agreements*, 41 B.C. ENVTL. AFF. L. REV. E. SUPP. 42 (2014), <http://lawdigitalcommons.bc.edu/ealr/vol41/iss3/>.

---

<sup>110</sup> See 524 F.3d 917, 935–36 (9th Cir. 2008).

<sup>111</sup> See 698 F.3d at 1113–14, 1119 (noting that categorizing mitigation measures as cumulative effects removes the mitigation measures from the consultation process of the ESA).

<sup>112</sup> See *id.* at 1117 (holding that a CAP to which an action agency has agreed must be enforceable under the ESA if factored into the FWS's jeopardy determination). The court stressed that Congress intended the ESA to be the federal government's primary tool to protect endangered species. *Id.*

<sup>113</sup> See *id.* at 1111, 1116–17.

<sup>114</sup> See *id.* at 1115–17 (explaining that Congress intended for the FWS to be the agency responsible for implementing the ESA).

<sup>115</sup> See *id.*